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No. 84-1459

In the Supreme Court of the United States

October Term, 1985

GUILLERMO HERNANDEZ-CARTAYA,
FRANCISCO J. FERNANDEZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE TRIAL COURT'S REFUSAL TO VOIR DIRE THE JURY ABOUT A NEWSPAPER ARTICLE CONCERNING THE PETITIONERS.

II. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF A NEW TRIAL ON THE BASIS OF AN ERRONEOUS JURY INSTRUCTION SIGNIFICANTLY MISSTATING THE GOVERNMENT'S BURDEN OF PROOF.

III. WHETHER THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S REFUSAL TO GRANT A MISTRIAL ON THE BASIS OF REMARKS MADE BY A CO-DEFENDANT WHICH CONSTITUTED COMMENT UPON THE PETITIONERS' FAILURE TO TESTIFY AT TRIAL.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
STATEMENT OF THE CASE 1
ARGUMENT 2
CONCLUSION 9

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STATEMENT OF THE CASE

We have no quarrel with the respondent's Statement of the Case, insofar as it describes the general factual and procedural context in which the issues on appeal arose. Several additional factual assertions, however, are made in the course of the respondent's argument, and many of them are simply wrong. We will address them in the course of our own argument.

ARGUMENT

I. The Newspaper Article. This point is discussed at pages 10-15 of the respondent's typewritten brief; we have not yet received a copy of its printed brief. As we indicated, the Court of Appeals assigned three reasons for upholding the trial court's refusal even to question the jurors about the offending article (A. 13). First, the court concluded that most of the information did not go beyond the record developed at trial. The respondent attempts to defend this conclusion in a long footnote at page 13 of its typewritten brief. The citations to the record are all lifted verbatim from the government's brief in the Court of Appeals (pp. 84-86), and these citations are no more relevant here than they were below. Before reviewing them, we should observe at the outset that the respondent makes no attempt to deny that at least six statements in the newspaper article were outside of the evidence heard at trial: that the WFC was involved in drug trafficking; that Cartaya was arrested in the Persian Gulf, and then again in Miami; that a WFC bank in an Arab country was missing more than $30,000,000.00; that Cartaya was actually charged with using a false passport; that the trial court thought there was substantial evidence of a conspiracy; and that the trial court thought that failure to report the bonuses would alone warrant conviction. Even if all of the other allegations in the article were known to the jury, these statements *alone* would have justified inquiry. But contrary to the respondent's representation to this Court, there was far more than that.

First—after pointing out that the jury did hear about Cartaya's experience at the Bay of Pigs, and about WFC expense accounts and luxury cars and salaries, which we

have acknowledged throughout the proceedings and about which we have raised no arguments—the respondent says that the jury also heard evidence about Cartaya's links to Cuba. We invite the Court to read the testimony cited (Tr. 3291-94), which says simply that Cartaya was a friend of a State Department officer in Havana in 1953. It does not even *hint* that Cartaya was linked to the CIA or to Fidel Castro, which was what the article reported. Second, the respondent contends that the jury knew that the WFC was alleged to be a large-scale swindle. But the testimony cited (Tr. 2763-65, 2773-74), suggests no such thing.[1] Third, the respondent cites a number of pages of the transcript for the proposition that the jury heard about "certain bank frauds." We invite the Court to read each and every one of the citations to the transcript provided. Not one of them even hints at any bank fraud, and there is simply no excuse for their citation to that effect.[2] Fourth, the respondent cites testimony through which the jury learned about Cartaya's use of a phony passport to get out of Ajman. We have never claimed otherwise; the article itself said that the jury knew about this. Fifth, the respondent cites testimony about various political pay-

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1. Part of that testimony discusses the charges of tax fraud which were the subject matter of the suit; part of it contains the highly-unsuccessful attempt by the prosecutor to get a witness to admit that he paid a bribe to an important official in Costa Rica; and part of it suggests that the WFC bank in Costa Rica went under because it was poorly managed. None of this testimony even hints that WFC was swindling anybody.

2. The only citation which even comes close is Tr. 2771-72, in which the prosecutor asks a witness if *that witness* had participated in any embezzling of proceeds of a loan from a European bank, and the witness answers "no." That is the end of the colloquy—and the suggestion comes in a question—not an answer—a question directed to a witness—not to Cartaya or to WFC. All of the other transcript cites offered by the respondent have no conceivable relevance to the introductory phrase "certain bank frauds."

offs by WFC in foreign countries. We have never claimed otherwise; the article itself mentioned that talk about "political payoffs" surfaced during the trial.

Sixth and finally, the respondent provides a long string of citations for the contention that the jury knew all about the "various government investigations of WFC and its officers . . . ." Mindful that the article expressly referred to FBI, Drug Enforcement Administration, Public Safety Department, and House narcotics subcommittee investigations of Cartaya and WFC, we ask this Court to review the transcript citations offered by the respondent (Tr. 1894-95, 1908-13, 2049-51, 2055-56, 2168-70, 3244-45). These passages mention only two government agencies—the IRS and the FBI. They do not even *hint* that the investigation of these two agencies involved anything other than the tax charges which were before the jury; indeed, the trial court scrupulously shielded the jury from any testimony about investigations beyond the charges at issue. And none of these citations contain any mention of the Drug Enforcement Administration, the Public Safety Department, or a House narcotics subcommittee. The respondent's introduction of these citations, with the representation that they concerned investigations in addition to those at issue before the jury, is indefensible. None of the cited testimony even *hinted* at the widespread government investigations—including drug investigations—reported in the article.

There can simply be no question that this article contained a substantial number of facts or allegations wholly outside of the evidence heard by the jury—including allegations of swindling and drug trafficking, and comments disclosing the trial court's belief in the defendants' guilt—which were overwhelmingly prejudicial to the petitioners.

We are happy to have the Court test that assertion against the citations to the transcript provided by the respondent.[3]

Second, the Court of Appeals concluded that the "[o]ther information [in the article] was unrelated to the charges for which the appellants were being tried." As we emphasized, that is precisely the point—and the respondent makes no attempt to defend this conclusion by the appellate court. As we also demonstrated, when the material at issue is prejudicial as a matter of law—that is, when there is simply no room for the exercise of any discretion by the trial court in concluding that the material in question is harmless—then the trial court has *no discretion* to decline a voir dire. The respondent, by its silence, concedes the point.

Third, the Court of Appeals relied upon the trial court's general boilerplate instructions to the jury. But as we emphasized, even a conscientious juror could have obeyed those instructions—not to read anything about the case or the trial—and still have read this article about the defendants and their company, and about unrelated accusations against them. The respondent offers no answer. Moreover, we also demonstrated that all of the courts to decide this question have held that boilerplate instructions are simply not enough—because juries ignore such instructions all the time. We agree with the respondent (page 15

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3. The respondent also argues that the article itself reported that some of the rumors were nothing more than rumors—and thus itself "contained a warning on its face regarding the truth of these items." We are content to have this Court decide for itself whether these allegations were helpful or harmful to the petitioners. The *fact* of various investigations—for swindling and drug charges—was reported. The *fact* of an accusation that one of WFC's foreign banks was missing $30,000,000.00 was reported. The *fact* of Cartaya's arrest for using a false passport was reported. And the other revelations, even if reporting only rumors, in no sense established that such rumors had proved to be false. This article was manifestly harmful to the petitioners.

of the typewritten brief, second footnote) that such instructions are "a legitimate factor to consider"—but that does not deny our point that no court has ever held such instructions to be dispositive in the face of significantly-prejudicial material.

We submit that the trial court manifestly abused its discretion in failing to recognize the inherently prejudicial nature of this newspaper article, and thus erred in failing to take the simple step of questioning the jurors about whether or not they had seen it. The respondent has said absolutely nothing to forestall that conclusion.

II. The Jury Instruction. The respondent discusses this point at pages 9-10 of its typewritten brief, pointing out that the jury charges must be considered as a whole. But under the authority cited in footnote 16 at page 14 of our petition, the trial court's various correct statements of the burden of proof were not enough to overcome the manifest prejudice of its misstatement of the burden of proof in the same charge. That charge told the jury that it could convict these defendants despite a reasonable doubt—and that was manifestly erroneous and manifestly harmful.

The Court of Appeals also commented that the defendants did not object to the charge when it was given orally. But as we pointed out, there is no way of knowing whether the oral charge was wrong—whether it was simply typed incorrectly and then given to the jury.[4] Moreover, as we

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4. In a footnote on page 9 of its typewritten brief, the respondent ascribes to us the assertion in the Court of Appeals that the District Court had given the correct charge orally but the reporter had transcribed it incorrectly. Here is what we said in our brief in the Court of Appeals (p. 7): "Of course, it is impossible to know for certain whether the trial court actually read that phrase to the jury, or whether the trial court gave a

(Continued on following page)

emphasized, even if the trial court had orally read the charge incorrectly as well as providing an incorrect written charge, the defendants' silence should not be dispositive in light of this fundamental constitutional error. Nothing could be more fundamental than an erroneous charge on the government's burden of proof in a criminal case—and the respondent has cited no authority to the contrary.

Footnote continued—

correct instruction, but the court reporter simply typed it wrong." And later in the same brief (p. 40): "Whether this erroneous instruction was given orally to the jury, or whether it was typed improperly after a correct instruction had been given orally to the jury, is impossible to determine from the transcript." The respondent has simply misstated our position. Likewise, the respondent has misstated its own position in the Court of Appeals, in stating that "[t]he government argued that it was unclear from the record whether" the oral charge was wrong, or simply the written transcription. In fact, the government's answer brief in the Court of Appeals (p. 48) expressly represented that the oral charge to the jury was correct. And again at page 101 of its brief in the Court of Appeals, the government asserted that "it is not disputed that the District Court correctly gave this instruction in its oral charge in all twenty places." Again, therefore, the respondent has mischaracterized both our position below, and its own.

Our position below was that because there was no way of determining whether the oral charge was correct or not, it would be inappropriate to preclude the defendants from asserting the error as a basis for reversal. And that is especially true in this case, in which the government represented in its answer brief that the oral charge given to the jury was correct. Since both parties were willing to accept that assumption, the only question before the appellate court was whether the submission of the erroneous written charge constituted reversible error.

Finally, in the same footnote, the respondent finds "no evidence that the transcript containing the erroneous charge was the copy that was in fact given to the jury"—only that the appellate court "assumed" that it was. That is incorrect. As we pointed out in the appellate court, the pages of the trial transcript containing the charge (Tr. 3903-35) are also consecutively numbered 1-33, and in addition are worn from handling by the jury. They are obviously the same pages which were provided to the jury. Three affidavits were submitted in the appellate court to sustain this position; they are attached to our reply brief, and they make clear beyond any doubt that the pages contained in the transcript are the pages which were provided to the jury.